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Nos. 93-517, 93-527, and 93-539

In The
Supreme Court of the United States
October Term, 1993

BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

LOUIS GRUMET, *et al.*,

Respondents.

On Writ of Certiorari to the
New York Court of Appeals

BRIEF OF INSTITUTE FOR RELIGION AND POLITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3 of this Court, the Institute For Religion And Polity respectfully submits this brief *amicus curiae* in support of Petitioners. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of the Court.

The Institute For Religion And Polity is a non-profit, non-partisan organization dedicated to the study of religious

values and the dynamics of church-state relations in contemporary society. Although the Institute's concerns are primarily academic, we believe this case raises a significant question whose disposition will have broad ramifications for Establishment Clause jurisprudence for many years to come, and that our perspective may complement the briefs of the parties and assist the Court in the resolution of this important issue.

SUMMARY OF ARGUMENT

Establishment Clause jurisprudence of the last several decades has been dictated by the principle that government must "pursue a course of complete neutrality toward religion," *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). This principle is inherently deficient, however, because a baseline definition of neutrality -- vital for ensuring the principle's consistent application -- cannot be established. Rather, the definition of neutrality appears to fluctuate from case to case, depending upon whether a court envisages, in the first instance, that the government action under challenge should be upheld or struck down. Like the fallacy of a "weighted hypothesis" in science, the neutrality principle leads in whichever direction a court wishes to go: It does not provide a principled way of knowing which direction is the correct one. Consequently, application of the neutrality test has led to a series of irreconcilable decisions -- and to grave concerns, even by members of the Court, that secularism has supplanted government accommodation of religion as the theoretical underpinning of the Establishment Clause. Because the courts' assessment of whether government action "endorses" or "inhibits" religion cannot be undertaken in a principled way, the neutrality test is not a legitimate mode of constitutional analysis.

A far more workable approach is for Establishment Clause analysis to focus on the extent to which some form of government coercion or compulsion can be discerned in the government action under scrutiny. Concern for this aspect of governmental power was the principal consideration of the Framers as the Religion Clauses were debated in the First Con-

gress. Reliance upon this test for ascertaining the lawfulness of legislative action will permit the courts greater latitude to accommodate religious communities and practices, thus promoting the ideal that religious influences are a positive force in the life of our Nation. Viewed in this framework, Chapter 748 is not facially invalid under the Establishment Clause. It is a reasonable accommodation of the acute needs of a religious community which involves no element of direct or indirect compulsion upon others.[1]

ARGUMENT

I. THE PRINCIPLE OF COMPLETE GOVERNMENT NEUTRALITY TOWARD RELIGION IS NOT ANALYTICALLY WORKABLE.

1. Throughout much of our Nation's history, the influence of religion in civic life was viewed as important to the well being of the body politic. Religion was seen as nurturing public virtue, and religious communities as promoting positive relations between the individual and the government. At least as far back as John Locke, civil society and religion were considered complementary, not mutually exclusive, realms, and religion was valued as a legitimate and important influence in public life. *See* Locke, J., *Letter Concerning Toleration*, in LOCKE: SELECTIONS 43-51 (S. Lamprecht, ed. 1956); *see also* A. REICHLEY, RELIGION IN PUBLIC LIFE 85-113 (1985).

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[1] The lower court reasoned that Chapter 748 has the primary effect of advancing religion because "the statute not only authorizes a religious community to dictate where secular educational services shall be provided to the children of the community, but also 'creates the type of symbolic impact that is impermissible under the second prong of the Lemon test.'" *Grumet v. Bd. of Education of the Kiryas Joel Village School District*, 618 N.E. 2d 94, 98 (N.Y. 1993). The majority relied on its conclusion that "only Hasidic children will attend the public schools in the newly established school district, and only members of the Hasidic sect will likely serve on the school board. *Ibid.*

Those who adopted the Constitution "believed that the public virtues inculcated by religion are a public good." *Lamb's Chapel v. Center Moriches Union Free School District*, 133 S. Ct. 2141, 2165 (1993)(Scalia, J., concurring in the judgment). Indeed, during the momentous summer of 1789, when Congress was in the process of drafting the First Amendment, it re-adopted the Northwest Territory Ordinance of 1787, Article III of which provides: "*Religion*, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 52 (emphasis added).

In his farewell address to Congress, George Washington warned of the "supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on the minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." 3 ANNALS OF AMERICA 612 (1968). Even Alexis de Tocqueville, touring the United States early in the nineteenth century, reported that Americans viewed religion as "indispensable to the maintenance of republican institutions." A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 58 (R. Hefner, ed. 1956).

Modern expressions of this proposition may also be found. Justice Douglas, writing for the majority in *Zorach v. Clausen*, 343 U.S. 308 (1951), observed that "we are a religious people whose institutions presuppose a Supreme Being." *Id.* at 313. "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." *Id.* at 313-314. And in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court stated that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions ... Anything less would require the 'callous indifference' we have said was never intended." *Id.* at 673 (citations omitted).

Accordingly, the Establishment Clause should not be applied in a way that is inconsistent with "the virtually unani-

mous view among the Founders that functional separation of church and state should be maintained without threatening the support and guidance received by republican government from religion." A.REICHLEY, *supra*, 112. While religion was not to be established, its *accommodation* was crucial to the moral foundations of our government. "Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings." *Abington School District v. Schempp*, 374 U.S. 203, 306 (1963)(Goldberg, J., concurring).

2. Notwithstanding widespread acknowledgement of the value of religion in the life of the Nation, this ideal has been undermined by a principle which has held sway in Establishment Clause jurisprudence since mid-century. This principle -- that government must "pursue a course of complete neutrality toward religion," *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) -- emerged from the Court's first Establishment Clause decision in the modern era, *Everson v. Board of Education*, 330 U.S. 1 (1947). In *Everson*, the Court considered whether a city could pay for the bus transportation of school-aged children to parochial as well as to public schools. The Court summarized the principal force behind the drafting of the Establishment Clause as the desire of the Framers to eliminate the civil disorder and persecution that historically had accompanied the establishment of a single sect. Although the challenged funding was held permissible, the Court stated in unequivocal terms that the Establishment Clause required an absolute neutrality on the part of government, both as between particular religions and as between religion and nonreligion. The decision closed with the now famous phrase from Jefferson's letter to the Danbury Baptists that the Establishment Clause "was intended to erect a 'wall of separation' between the church and the state." 330 U.S. at 15-16 (quoting *Reynolds v. United States*, 98 U.S. 145 (1879)). "That wall must be kept high and impregnable," wrote the Court. "We could not approve of the slightest breach." *Id.* at 18.

For more than twenty years after *Everson*, the Court applied the neutrality principle by asking whether a challenged governmental action was secular in its purpose and primary effect. *See Abington School District v. Schempp*, 374 U.S. 222 (1962). The Court later added a third consideration, whether the state action fostered "an excessive ... entanglement with religion." *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). In *Lemon v. Kurtzman*, *supra*, the Court synthesized its prior decisions into the famous three-pronged test used to invalidate the legislation at issue in this case. *Lemon* was expressly predicated upon the concept of neutrality first articulated in *Everson*.

The objective of government neutrality toward religion has been articulated repeatedly in the years since *Everson*. "In the relationship between man and religion," said the Court in *Abington School District*, 374 U.S. at 226, "the state is firmly committed to a position of neutrality." *See also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("Government in our democracy, state and nation, must be neutral in matters of religious theory, doctrine, and practice.... The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *Lynch v. Donnelly*, 465 U.S. at 692 (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.").

3. The concept of neutrality is beguiling because it seems intuitively valid, connoting the spirit of objectivity we should expect of courts in applying the Establishment Clause. But Establishment Clause analyses predicated upon this lodestar have been continually problematic, leading to inconsistent decisions in varied contexts. For example, in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), the Court held that display of a creche in Pittsburgh violated the Establishment Clause while display of a menorah in the same city did not. The display of the Pittsburgh creche was invalidated even though, four years earlier, the Court upheld the display of a Rhode Island creche situated with Santa Claus and reindeer.

Lynch v. Donnelly, supra. Such inconsistencies are attributable, in our view, to an inherent deficiency in the neutrality principle which makes it impossible to apply coherently.

The logical deficiency of the neutrality principle can be illustrated by considering the "effects" prong of the *Lemon* test, used to invalidate the legislation in this case. Analyses under this criterion of *Lemon* have yielded a chiefly subjective focus: "[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely *to be perceived* by adherents of the controlling denomination as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices." *School District of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985) (emphasis added).

Following this approach, the majority of the court below found Chapter 748 unconstitutional because it determined that the creation of the Kiryas Joel School District is "sufficiently likely to be perceived by the Satmar Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval, of their individual religious choices." *Grumet*, 618 N.E. 2d at 100. In the lower court's view, the mere enactment of the law created the kind of "symbolic union of church and state" that is unconstitutional. *Ibid*.

At least two critical shortcomings inhere, however, in an analysis which proceeds in this fashion. First, the argument from perceptions -- here, reliance upon the perceptions of the Satmar Hasidim *vs*. the perceptions of "nonadherents" -- in effect eliminates the possibility of a neutral position. For, whenever government and religion are publicly associated, support for religion might be inferred by some; and whenever the two are purposefully separated, hostility to religion might be inferred by others. The point is especially dramatic in this case. By definition, the Satmar Hasidim and "nonadherents" hold incompatible worldviews and, in this context, are likely to perceive the creation of the school district differently. Thus, consideration of the likely subjective reactions of partisan groups

cannot shed genuine light on the matter. *A fortiori*, when the perceptions of partisan groups are at issue, members of one group may tend to perceive "endorsement" while members of the other group may perceive an "inhibition" of the religious activity in question.

Indeed, as Judge Bellacosa pointed out in his dissent to the lower court's holding: "Reasonable minds may differ" as to whether Chapter 748 constitutes a "forbidden endorsement of religion." "'Objective observers' could not, in my view, so definitively conclude or perceive this situation as an establishment of religion, without inspiring some inquiry as to whether their views perhaps suffered from a predisposed hostility to religion in the constitutional debate sense." *Grumet*, 618 N.E. 2d at 115. In other words, "no message of endorsement for Satmar theology or its particular separatists tenets need necessarily or can fairly be inferred, either by objective third parties or by the protagonists themselves." *Ibid.*

Moreover, citizens' perceptions are not verifiable. Under the subjective effects analysis, the issue of governmental endorsement becomes a consideration of how the actions of the government will or might be misunderstood. In order to apply the notion of symbolic union objectively, the courts would be required to determine when citizens' responses are a product of antecedent dispositions for or against the religious activity in question, rather than the product of an impartial weighing of "objective" evidence. Because this approach necessarily requires courts to make difficult calculations which, even in the end, are inherently non-verifiable, its value is extremely limited.

Nor can the neutrality principle be salvaged by trying to focus on more objective ramifications of its application. For example, let us suppose hypothetically a legislative action which creates an environment in which a religious community flourishes, thus leading to a *verifiable* conclusion (measured, for instance, by membership statistics) that the government action promotes the welfare of that religious group. On the other hand, suppose that the government's refusing to take the action in

question results in the religious community's being adversely affected -- again, in some verifiable way. In the former case, the government could be criticized for having taken a measure that "endorses" religion, which the neutrality principle does not permit. In the latter case, the government's withholding action could be criticized for "inhibiting" religion -- a similarly impermissible result. The neutrality principle can thus be applied defensibly in both cases to reach two contradictory and incompatible results.

The problem, of course, is that the term "neutrality" has fluctuating connotations depending upon which outcome is envisaged when the analysis begins. In other words, it is impossible to arrive in a principled way at a baseline measure of religious neutrality. Deciding where to set the neutrality baseline, decides the issue -- yet deciding where to begin is not a principled calculation. It appears, rather, to depend upon whether a court is inclined, in the first instance, to uphold or strike down the government activity in question. Thus, "[w]hen we wish to strike down a practice it forbids, we invoke [the *Lemon* test]," but "when we wish to uphold a practice it forbids, we ignore it entirely." *Lamb's Chapel*, 113 S. Ct. at 2150 (Scalia, J., concurring in the judgment). Professor Bobbitt has made the point this way: "As a principle, a neutrality thesis is no help in this matter, because we have no adequate notion of generality on which a neutrality thesis, if it is to guide decision, must depend.... Robbed of a standard of generality, the rule of neither advancing nor inhibiting religion is crippled." P. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 208 (1982). We are thus left with "the strange Establishment Clause geometry of crooked lines and wavering shapes [which *Lemon*'s] intermittent use has produced." *Lamb's Chapel*, 113 S. Ct. at 2150.

4. Whereas previous eras viewed religion as an influence that is essential to civilized society, the current requirement that government remain completely neutral with respect to the religious choices of its citizens suggests, strangely, that a wholly secular society should be our collective aspiration. This per-

spective flies in the face of everything we know about the purpose of the Establishment Clause. In this connection, Justice Stewart's dissent in *Abington School District* has particular currency. He viewed that decision "not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at least government support for the beliefs of those who think that religious exercises should be conducted only in private." 374 U.S. at 313 (Stewart, J., dissenting). Justice Goldberg expressed the same fear: "[U]ntutored devotion to the concept of neutrality can lead to ... results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Id.* at 306 (concurring opinion, joined by Harlan, J.). *See also, by analogy*, Religious Freedom Restoration Act of 1993, *supra* ("laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise").

Contrary to the "best of our traditions" (*Zorach*, 343 U.S. at 314), neutrality and separation reflect a conception of religion that is wholly unconnected to government and other institutions of public life. For this reason we urge the Court to re-think the *Lemon* test and the neutrality principle which is its foundation.

II. ACCOMMODATION OF RELIGION IN CIVIC LIFE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE, ABSENT DIRECT OR INDIRECT COERCION BY THE GOVERNMENT.

1. The fundamental problem with the *Lemon* test and the neutrality principle which undergirds it, is that the test yields inconsistent results depending upon the baseline of neutrality from which courts begin their analyses. For this reason, we urge the Court to adopt a different test -- one which more adequately satisfies the dual requirements of "principled adjudication and fidelity to the Constitution." A.GOLDBERG, EQUAL JUSTICE 71 (1971). In addition to be being logically sound and

capable of consistent application, an appropriate substitute for the *Lemon* test must harmonize with the contemporaneous understanding of the import of the text it purports to illumine. "The line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Abington School District v. Schempp*, 374 U.S. at 294 (Brennan, J., concurring). This Court has "declined to construe the Religion Clauses" in a way "that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Commission*, 397 U.S. at 671.

A principle which satisfies these requirements focuses attention on whether any form of government coercion or compulsion is a factor in the government action under challenge. *See generally*, M. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986). This element of the church-state issue was the principal concern when the matter was considered by the First Congress. James Madison, who led the debate on the First Amendment in Congress, "apprehended the meaning of the [Religion Clauses] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 ANNALS OF CONGRESS 730 (J. Gales ed. 1934) (Aug. 15, 1789). Arguing that the proposed amendment was not intended to inhibit religion, Madison stated that he "believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 731. *See McGowan v. Maryland*, 366 U.S. 420, 441 (1961). The notion of compulsion was at the heart of Madison's interpretation of the Religion Clauses. It was *compelled* religious exercises which violated the First Amendment.

In his famous *Memorial and Remonstrance Against Religious Assessments*, Madison said that a proposed tax for Christian teachers in Virginia was an impermissible establishment because religion "can be directed only by reason and conviction, not by force or violence," and that "compulsive

support" of religion is "unnecessary and unwarrantable." Madison, *A Memorial and Remonstrance Against Religious Assessments* ¶¶ 1, 3, 4 (June 20, 1785). Thus, compulsion was viewed as "the essence of an establishment." McConnell, *supra*, at 937. Similarly, Thomas Jefferson's *Virginia Bill For Religious Liberty* provided in part: "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested or burthened, in his body or good, nor shall otherwise suffer on account of religious belief. 12 Hening, Statutes of Virginia 84 (1923) (quoted in *Everson*, 333 U.S. at 13).

The Founders contemplated that the Religion Clauses would ensure the accommodation of government toward religion necessary to protect the liberties which were the overriding concern of the First Congress. "The proscribed area would be limited to the narrow ground of compulsion in matters of belief and of elevating a particular sect or combination of sects to governmentally mandated primacy in a society characterized by a healthy diversion of religious viewpoints and affiliations." K. Starr, Annual Lecture For The Supreme Court Historical Society 14 (May 18, 1987).

Many pronouncements by this Court have been consistent with this rendering of the Establishment Clause. For example, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court interpreted the Establishment Clause as "forestal[ling] compulsion by law of the acceptance of any creed or the practice of any form of worship." *Id.* at 303. Similarly, in *McCollum v. Board of Education*, 333 U.S. 203 (1948), public school release time programs and Sunday closing laws were reviewed by looking for an element of coercion. The issue of coercion was likewise the focus of the Court's analysis in such landmark cases as *Everson, 330 U.S. at 15-16; Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) ("To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."); *Estate of Thornton v. Caldor, Inc.*,

472 U.S. 703, 710 (1985)("unyielding" preference for Sabbath Observers required fellow employees to "conform their conduct to [others'] religious necessities'"(citation omitted)); *McGowan v. Maryland*, 366 U.S. at 441 (1961).

In contrast to the neutrality principle's inconsistent results, an approach centered upon the notion of coercion lends rationality to the diversity of religious activities which, over the course of time, have been accepted as part of our national culture: "the appointment of congressional chaplains, the provision in the Northwest Ordinance for religious education, the resolutions calling upon the President to proclaim days of prayer and thanksgiving, the Indian treaties under which Congress paid the salaries of priests and clergy, and so on." McConnell, *supra*, at 939. "These actions, so difficult to reconcile with modern theories of the Establishment Clause, are much easier to understand if one sees religious coercion as the fundamental evil against which the clause is directed." *Ibid.*

2. The parameters of an approach which makes direct or indirect coercion the linchpin of Establishment Clause analysis have been sketched by Justice Kennedy, who discerns two "limiting principles" from the Court's cases: (1) "government may not coerce anyone to support or participate in any religion or its exercises," and (2) "it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion to such a degree that it establishes a state religion or tends to do so." *County of Allegheny*, 492 U.S. at 659-660 (Kennedy, J., concurring in the judgment in part and dissenting in part). *See also* Brief For The United States As Amicus Curiae Supporting Petitioner at 15, *Lee v. Weisman* (No. 90-1014)(The *Lemon* test should be replaced "by a single, careful inquiry into whether the practice at issue provides direct benefits to a religion in a manner that threatens the establishment of an official church or compels persons to participate in a religion or religious exercise contrary to their consciences.")

As Justice Kennedy noted in his opinion in *Allegheny*: "These two principles are related, for it would be difficult

indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing." 492 U.S. at 659-60 (concurring in part and dissenting in part).

We do not mean to suggest, of course, that a coercion standard would eliminate all difficulties in this area. As Justice White has written, "Establishment Clause cases are not easy" because "they stir deep feelings." *Committee For Public Education v. Regan*, 444 U.S. 646, 662 (1981). But such a standard has at least three virtues over the *Lemon* test: It may be applied coherently; it is grounded on the historically sound premise that religion influences civic life in important and positive ways; and it reflects the contemporaneous understanding of the Framers. A coercion standard will thus focus attention on legislative actions which pose a realistic threat to Establishment Clause values.

3. Viewed in this framework, the legislation at issue in this case does not violate the Establishment Clause. There is no suggestion here that the government's power to coerce has been used to further the interests of Judaism. No one was compelled to observe or participate in any religious activity. Nor is there any indication that this represents a first step toward an establishment of religion. Chapter 748 is merely an accommodation of the needs of a community of devoutly religious people whose disabled children require the same sorts of educational facilities as do the disabled children of other public school districts.

Thus, the New York Legislature's action "falls well within the tradition of government accommodation which has marked our history from the beginning." *County of Allegheny*, 492 U.S. at 663 (Kennedy, J., concurring in part and dissenting in part). *See Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 144-45(1987)("The government may (and sometimes must) accommodate religious practices ... and may do so

without violating the Establishment Clause."); *Lynch*, 465 U.S. at 673 (The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions...").

Religious pluralism is a tradition firmly rooted in our culture and one of the great strengths of American society. At a time in our history when the moral condition of our people has never been in greater need of attention, we urge the Court to embrace an Establishment Clause formula which more effectively accommodates religious practices and communities, and thus properly countenances the vital role that religion plays in the moral health of our Nation.

CONCLUSION

For the foregoing reasons, the decision of the New York Court of Appeals should be reversed.

Respectfully submitted,

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